

February 15, 2007

Sunshine Reform Task Force
City of San Jose

Dear Chair and Members of the Task Force,

On behalf of Californians Aware (CalAware), I ask you to consider adopting a policy that guarantees the residents of San Jose and other members of the public the maximum ready access to information about crimes, arrests, and other centers of attention or response by the San Jose Police Department (SJPd).

CalAware is a nonprofit organization established to help journalists, public officials and employees, and other civic-minded citizens keep Californians aware of what they need to know in the interest of informed self-government. Its mission is to support and defend open government, an enquiring press, and a citizenry free to exchange facts and opinions on public issues.

When our representative visited SJPd last December 4 as part of a statewide public information access audit of more than 200 police, sheriffs' and California Highway Patrol stations, her experience was slightly below the statewide average of F plus. In particular, as you can read in the auditor's detailed report on our website at

http://www.calaware.org/audits/details_police.php?id=145&return_url=http%3A%2F%2Fwww.calaware.org%2Faudits%2Fsearch.php%3Fin_order_key%3D%26in_order_direction%3D%26in_dept%3DSan%2BJose%2BPolice%2BDepartment%26in_recperpage%3D10%26in_city%3D%26in_county%3D%26in_auditor%3D%26in_media%3D%26in_grade%3D%26search%3DSearch, the request barriers alone at SJPd headquarters were so extensive that the question of exactly what crime information was accessible there did not come up.

Nor is the department's website much help. The public records request form found there indicates that it need not be used to make a request. But instead of listing what information is available to the public it inquires what "documents" are being requested—as if the public had any ready notion of what documents the department has.

"Tell us what you want and we'll tell you what you can have" is precisely the reverse of an approach geared to maximum public access to information presumed to be public. I am enclosing a model public information policy designed by CalAware, as a result of our audit findings, to be used:

- as a public declaration, signed and promulgated by the highest commander in a department—the police chief or sheriff—of the department's policy and rationale concerning disclosure of information to the public;
- as a self-contained policy statement to be handed to requesters and even posted at public contact points, anticipating and answering most of the basic questions they might have; and
- as a training document apprising all officers and other personnel of the disclosure standards they will be expected to read and heed in their dealings with the public—with oversight from the very top.

This document explains but does not expand on the governing state law as to what must be disclosed from crime, arrest or incident reports. A department has full discretion to go beyond the minimum requirements of state law. The San Francisco Sunshine Ordinance, whose first provisions I drafted about 15 years ago, allows the sheriff and district attorney to disclose information or not consistent with their constitutional independence and the California Public Records Act. But as to records of the San Francisco Police

Department itself, subdivision (d) of section 67.23 of the ordinances of the City and County of San Francisco provides:

Records pertaining to any investigation, arrest or other law enforcement activity shall be disclosed to the public once the District Attorney or court determines that a prosecution will not be sought against the subject involved, or once the statute of limitations for filing charges has expired, whichever occurs first. Notwithstanding the occurrence of any such event, individual items of information in the following categories may be segregated and withheld if, on the particular facts, the public interest in nondisclosure clearly and substantially outweighs the public interest in disclosure:

(1) The names of juvenile witnesses (whose identities may nevertheless be indicated by substituting a number or alphabetical letter for each individual interviewed);

(2) Personal or otherwise private information related to or unrelated to the investigation if disclosure would constitute an unwarranted invasion of privacy;

(3) The identity of a confidential source;

(4) Secret investigative techniques or procedures;

(5) Information whose disclosure would endanger law enforcement personnel; or

(6) Information whose disclosure would endanger the successful completion of an investigation where the prospect of enforcement proceedings is concrete and definite.

This approach is not new or radical. It is modeled on the law enforcement investigative file exemption in the federal Freedom of Information Act, which governs, for example, the FBI, DEA and ATF. The basic notion is that when and if the prospect of further investigation has effectively ended as a matter of decision or the passage of time, and with certain protections for unique law enforcement interests, the public has at least as much right and interest in scrutinizing the performance of a police department as it does in scrutinizing how other departments perform their functions.

A sunshine ordinance worthy of the name is not simply a reformulation of the minimal standards of state law. It is a response to the Legislature's invitation, in subdivision (e) of section 6253 of the Government Code, stating, "Except as otherwise prohibited by law, a state or local agency may adopt requirements for itself that allow for faster, more efficient, or greater access to records than prescribed by the minimum standards set forth in this chapter."

Given the quantity of other information SFPD has placed on its website, adding the basic crime, incident and arrest facts presumed public in Government Code Section 6254, subdivision (f), paragraphs (1) and (2) would be a decided and appropriate way of providing "faster, more efficient, and greater access to records" than the spoon feeding, all but grudging procedure now in place. Adding a provision permitting access to dead case files would be a real ray of sunshine catching the spirit of the new constitutional amendment added by Proposition 59 of 2004: "The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny."

Sincerely,

Terry Francke
General Counsel
Californians Aware

